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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

FURHAN SHAH, Plaintiff and Respondent, v. MICHAEL ROSS, et al., Defendants and Appellants.	B286783 (Los Angeles County Super. Ct. No. BC589863)

APPEAL from an order of the Superior Court of Los Angeles County, Michael P. Linfield, Judge. Affirmed.

Law Offices of Daniel Friedlander and Daniel A. Friedlander for Defendants and Appellants.

Luna & Glushon, Robert L. Gushon and Sean M. Bryn for Plaintiff and Respondent.

Plaintiff Furhan Shah brought suit against his neighbors, defendants Michael and Phyllis Ross, alleging

that the trees on the Ross property violated the Declaration of Restrictions (CC&Rs) of the housing community of which they were both members. The Rosses succeeded at trial, and sought their attorney fees as prevailing parties on a contract with an attorney fee provision—specifically, the CC&Rs—and alternatively with respect to an action affecting a public right, under Code of Civil Procedure section 1021.5.[1] The trial court denied fees on the grounds that the CC&Rs provided for fees only in actions involving the homeowners association, not in actions between homeowners, and the Rosses sought to vindicate private economic interests, not a public right. The Rosses appeal from the denial of attorney fees. We conclude that the language of the CC&Rs does not provide a basis for an award of fees in actions between private homeowners, application of Civil Code section 1717 does not require a different result, and the Rosses are not entitled to fees for vindicating a public right. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Litigation

Only the broadest explanation of the underlying litigation is necessary for the resolution of this appeal. The Rosses and Shah live across the street from each other in an

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

area known as Mount Olympus. Their properties are subject to CC&Rs which were first recorded in the 1960's. The CC&Rs were originally recorded by the developer of the property, which was identified in the CC&Rs as the "Declarant." The Mount Olympus Property Owners Association (MOPOA) is the successor to the Declarant. (See *Mount Olympus Property Owners Assn. v. Shpirt* (1997) 59 Cal.App.4th 885, 887 (*Shpirt*).)

Michael Ross first purchased his property in 1981. Thirty-four years later, on July 2, 2015, Shah purchased the property across the street, and uphill, from Ross and his wife. The dispute in this case centered on eight trees on the Rosses' property. Less than 30 days after purchasing his property, Shah brought this suit against the Rosses, alleging that the Rosses' trees violated the CC&Rs, in that paragraph 5.03 of the CC&Rs provides that "[n]o obstructions or trees having a height greater than ten (10) feet above the finished graded surface of the ground upon which it is located which would deprive any owner within a five hundred (500) foot radius of such obstruction or trees of a view shall be erected or maintained without the written approval of Declarant." The trees have been on the Rosses' property for decades, and have exceeded 10 feet in height since the early 1980's.

The operative complaint is Shah's second amended complaint, which alleged causes of action for (1) breach of the CC&Rs; (2) private nuisance; (3) public nuisance; and

(4) declaratory relief. The Rosses answered and the case proceeded to a bench trial.[2]

At the request of both parties, the trial court viewed the site. It observed hundreds, if not thousands, of trees in Mount Olympus which exceeded 10 feet in height and routinely obstructed portions of neighbors' views. The court concluded that the 10-foot height restriction in the CC&Rs was not enforceable by Shah against the Rosses for multiple reasons. Among them was that enforcement must be reasonable, and given the present growth of trees in Mount Olympus, enforcing the restriction uniformly in the area would "wreak havoc on Mt. Olympus," "drastically lower[ing] property values for Mt. Olympus property owners." Further, with respect to the eight trees at issue, the trial court found, "[u]nder any reasonable interpretation of 'obstructing a view,' Shah's view has not been obstructed by Ross' trees," because the few trees blocked at most 5 percent of the 270 degree view out of Shah's master bedroom. The trial court found for the Rosses on all causes of action in Shah's complaint.

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[2] The Rosses also pursued a cross-complaint against Shah and his father. The cross-complaint included a cause of action for declaratory relief seeking a determination that paragraph 5.03 of the CC&Rs is outdated, unconscionable, and unenforceable against any property owner in Mount Olympus who is burdened by the restriction. The trial court denied relief on the cross-complaint, and that ruling is not at issue in this appeal.

The Attorney Fees Motion

As prevailing party, the Rosses sought their attorney fees. Their motion raised three alternative theories: (1) under an attorney fees clause in the CC&Rs; (2) under section 1021.5 [action affecting an important public right]; and (3) a statutory right to fees under the Davis-Stirling Common Interest Development Act (Civ. Code, § 1350 et seq.). The Rosses do not pursue the third ground on appeal and we do not address it.[3]

With respect to the first basis, fees under the CC&Rs, the Rosses relied on the intersection of two of the document's provisions. Paragraph 12.01 states, "The provisions contained in this Declaration shall bind and inure to the benefit of and be enforceable by Declarant and the owners of any portion of said property, or their respective legal representatives, heirs, successors and assigns." Paragraph 12.04 states, "In any legal or equitable proceeding by Declarant for the enforcement, or to restrain a violation of, this Declaration or any provisions hereof, the losing party or parties shall pay the attorneys' fees of the winning party or

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[3] Years ago, MOPOA and Ross successfully brought suit against another homeowner in Mount Olympus who had violated the CC&Rs. The trial court awarded Ross his attorney fees under the Davis-Stirling Common Interest Development Act. On appeal, the award of fees was reversed on the basis that Mount Olympus was not, in fact, a common interest development within the meaning of the Act. (*Shpirt*, *supra*, 59 Cal.App.4th at p. 894–897.)

parties in such amount as may be fixed by the court in such proceeding." The Rosses argued below that the extension of the Declarant's rights of enforcement to individual homeowners in paragraph 12.01 included the Declarant's right to recover attorney fees under paragraph 12.04 in an enforcement action.

Alternatively, the Rosses argued that they were entitled to public interest attorney fees for having conferred a significant benefit on a large class of persons—specifically, because of the trial court's statements that it would not be reasonable uniformly to enforce the 10-foot tree height limitation throughout Mount Olympus.

The trial court denied the attorney fees motion. As to the contractual right to fees under the CC&Rs, the court concluded that the plain language of paragraph 12.04 limits the right to attorney fees to actions by the Declarant (now its successor, the MOPOA), which was not a party to the litigation. As to section 1021.5, the court denied fees because although part of the rationale for its verdict related to the possible deleterious effects of uniform enforcement throughout Mount Olympus, the actual claims at issue in the case pertained only to eight trees on the Rosses' property.

The Rosses filed a timely notice of appeal.[4]

DISCUSSION[5]

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[4] Shah filed a notice of appeal from the underlying judgment. He subsequently abandoned that appeal.

Prevailing Party Attorney Fees Under the CC&Rs and Civil Code 1717

The Rosses contend that the trial court erred in determining that the Mount Olympus CC&Rs and Civil Code Section 1717 do not provide a legal basis for an award of attorney fees to them as prevailing parties in defending against Shah's complaint. We find no error and affirm.

Standard of Review

"CC&R's are interpreted according to the usual rules for the interpretation of contracts generally, with a view toward enforcing the reasonable intent of the parties.

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[5] At our invitation, the parties briefed whether the record was sufficient for our review, given that the Rosses did not provide a reporter's transcript or settled statement of the hearing on their motion for attorney fees. Given that the issues relating to interpretation of the CC&Rs is de novo, and given the trial court's detailed statements of decision on the merits and attorney fees issues as they relate to the court's exercise of discretion under section 1021.5, we find the record adequate. (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 933 ["While a record of the hearing would have been helpful to understand the trial court's reasoning, it is not necessary here where our review is de novo and the appellate record includes the trial court's written orders and all the evidentiary materials germane to Appellants' motion"].)

[Citations.] Where, as here, the trial court's interpretation of the CC&R's does not turn on the credibility of extrinsic evidence, we independently interpret the meaning of the written instrument." (*Harvey v. The Landing Homeowners Assn.* (2008) 162 Cal.App.4th 809, 817 (*Harvey*).)

With respect to attorney fees, "'a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo.' [Citation.]" (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751.) Although in some circumstances, where factual questions predominate, this may present a mixed question of law and fact warranting a deferential standard of review, "where the material facts are largely not in dispute, our review is de novo." *(Ibid.)* The parties did not offer extrinsic evidence to the trial court regarding the interpretation of either the CC&Rs generally or the attorney fees clause contained in the CC&Rs in particular. Therefore, our review is de novo.

Law Relating to Interpretation of CC&Rs and Attorney Fees Clauses

"The language of the CC&R's governs if it is clear and explicit, and we interpret the words in their ordinary and popular sense unless a contrary intent is shown. [Citations.] The parties' intent is to be ascertained from the writing alone if possible. [Citation.]" (*Harvey*, *supra*, 162 Cal.App.4th at p. 817, fn. omitted.) CC&Rs, like other

contracts, are subject to the interpretive principle that ""[w]e must give significance to every word of a contract, when possible, and avoid an interpretation that renders a word surplusage." [Citation.]"" (*PV Little Italy, LLC v. MetroWork Condominium Assn.* (2012) 210 Cal.App.4th 132, 161 (*PV Little Italy, LLC*), quoting *Advanced Network, Inc. v. Peerless Ins. Co.* (2010) 190 Cal.App.4th 1054, 1063–1064.)

With respect to attorney fees, the starting point, of course, is the American rule: "Under the American rule, each party to a lawsuit ordinarily pays its own attorney fees. [Citation.] Code of Civil Procedure section 1021, which codifies this rule, provides: 'Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties . . .' to "'contract out" of the American rule' by executing an agreement that allocates attorney fees." [Citations.]" (*Mountain Air Enterprises, LLC*, *supra*, 3 Cal.5th at p. 751.)

The Attorney Fees Clause Does Not Apply to Actions Between Homeowners

Here, the attorney fee clause is the second sentence of paragraph 12.04 of the CC&Rs. It provides, "In any legal or equitable proceeding by Declarant for the enforcement, or to restrain a violation of, this Declaration or any provisions hereof, the losing party or parties shall pay the attorneys'

fees of the winning party or parties in such amount as may be fixed by the court in such proceeding."

We are not the first appellate panel to be presented with the precise question at issue here: whether paragraph 12.04 provides a legal basis for an award of attorney fees in actions between Mount Olympus homeowners. In the prior suit that also involved Ross—*Shpirt*, *supra*, 59 Cal.App.4th 885—Ross argued several legal grounds for an award of attorney fees, including paragraph 12.04 of the Mount Olympus CC&Rs. (*Id.* at p. 893.) The trial court in that matter ruled that Ross was "'not entitled to attorneys fees under the CC&R's,'" explaining, "'The CC&R's, however, clearly exclude the award of attorneys fees in actions brought by individual homeowners, in contrast to actions brought by [MOPOA]. Although Section 12.01 provides that the CC&R's are enforceable by either the "Declarant" (MOPOA) and the owners, Section 12.04 provides for attorneys fees only to the Declarant.'" (*Ibid.*) The Court of Appeal affirmed, stating, "We see no reason to disturb the trial court's ruling in this regard. As the court noted, paragraph 12.01 of the CC&R's permits both MOPOA and individual homeowners to enforce its provisions, but paragraph 12.04 specifies that fees are awardable only to 'Declarant' (MOPOA). The CC&R's do not assist Ross in his quest for attorney fees." (*Id.* at p. 896.)

The Rosses' arguments for declining to follow *Shpirt* are unpersuasive. First, the Rosses assert the appellate court in *Shpirt*, by choosing not "to disturb" the ruling of the

trial court interpreting the CC&Rs, did not really decide the issue of contract interpretation at all. This assertion has no merit. The appellate court specifically ruled that while paragraph 12.01 of the CC&Rs permitted homeowners to enforce various provisions, paragraph 12.04 limited fees such that they are not available in actions not involving the MOPOA. *Shpirt* rejects the very argument the Rosses make again here: that reading paragraphs 12.01 and 12.04 together indicates attorney fees are available in suits between homeowners.

Second, the Rosses dismiss *Shpirt* for not analyzing the contract issue. We conclude *Shpirt* decided the issue based on the plain language of the CC&Rs, and agree with *Shpirt*'s interpretation. The plain meaning of the attorney fees clause limits its reach to "any legal or equitable proceeding by Declarant for the enforcement [of the Declaration]." An interpretation of this clause that would encompass proceedings brought by individual homeowners would violate a fundamental interpretive principle, as it would not give effect to the words "by Declarant," rendering them surplusage. (*PV Little Italy, LLC*, *supra*, 210 Cal.App.4th at pp. 161–163.) Looking at the clause in the context of other paragraphs, this limiting language stands in direct contrast to paragraph 12.01, relied upon by the Rosses, which expansively refers to the provisions of the CC&Rs being "enforceable by Declarant *and the owners of any portion of said property*." (Italics added.) The Rosses' attempt to read this additional language ("and the owners of any portion of

said property") from paragraph 12.01 into the attorney fees clause of paragraph 12.04, where it does not appear, is contrary to the plain language of the CC&Rs.

Civil Code Section 1717 as Applied to the CC&Rs Does Not Provide a Basis for the Fee Award

The Rosses further contend that, despite the language in the attorney fees clause limiting fees to actions "by Declarant," they are nevertheless entitled to an award of fees in this action brought by Shah pursuant to Civil Code section 1717. Civil Code section 1717, subdivision (a), provides, in pertinent part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. [¶] Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract."

"The statute was designed to establish mutuality of remedy when a contractual provision makes recovery of attorney fees available to only one party, and to prevent the

oppressive use of one-sided attorney fee provisions." (*Trope v. Katz* (1995) 11 Cal.4th 274, 285; see also *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128.) Courts have recognized that Civil Code section 1717 can be used "to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions . . . [¶] . . . 'when the contract provides the right to one party but not to the other.' [Citation.] In this situation, the effect of section 1717 is to allow recovery of attorney fees by whichever contracting party prevails, 'whether he or she is the party specified in the contract or not' (§ 1717, subd. (a))." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610–611.)

The attorney fees clause at issue here—paragraph 12.04—does not lead to "one-sided" or "oppressive" awards of fees, and no issue of ensuring reciprocity is presented. In an action between homeowners, as contrasted with suits where MOPOA is a party, neither a plaintiff nor a defendant litigating a contractual dispute under the CC&Rs is entitled to prevailing party attorney fees. (See *Shpirt*, *supra*, 59 Cal.App.4th at pp. 893, 896.)[6] Accordingly, Civil Code section 1717 does not provide a legal basis for a fee award here.

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[6] The trial court in *Shpirt* rejected an argument by Ross under Civil Code section 1717, because the issue under the Mount Olympus CC&Rs relating to a suit between homeowners does not present problems with reciprocity. (*Shpirt*, *supra*, 59 Cal.App.4th at p. 893.) In affirming the trial court, the appellate court did not expressly discuss Civil Code section 1717. (*Id.* at pp. 896–897.)

Attorney Fees Under Section 1021.5

The Rosses contend that the trial court also erred in denying their request for attorney fees pursuant to section 1021.5, the private attorney general statute, because they claim to have enforced an important public right. We conclude that the trial court acted within its discretion in denying fees under section 1021.5.

Requirements for Fee Awards Under Section 1021.5 and Standard of Review

"'Three basic criteria are required to support an award of attorneys' fees under section 1021.5: (1) the action resulted in the enforcement of an important right affecting the public interest; (2) a significant benefit was conferred on the general public or a large class of persons; and (3) the necessity and financial burden of private enforcement were such as to make the award appropriate.' [Citation.]" (*DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 197.) While a party can be awarded fees for defending an action "'"primarily to advance"' a public interest," fees will not be awarded where "the essence and fundamental outcome of its defense was the advancement of its own economic interests." (*Id.* at p. 199.)

The decision as to whether to award fees pursuant to section 1021.5 is within a trial court's discretionary power.

(*DiPirro v. Bondo Corp.*, *supra*, 153 Cal.App.4th at pp. 197–198.) "'"Where, as here, a trial court has discretionary power to decide an issue, its decision will be reversed only if there has been a prejudicial abuse of discretion." [Citations.]' [Citation.]" (*Id.* at p. 197.)

The Trial Court Acted within its Discretion in Denying Fees to the Rosses

Here, the trial court denied the request for fees under section 1021.5 because "the advancement of any public interest with the defense of the action was merely incidental to achieving [the Rosses'] personal goals." More specifically, the trial court explained that Shah had limited his effort to enforce the tree height restriction in the CC&Rs to eight specifically identified trees on the Rosses' property; and Shah did not seek to enforce broad restrictions that would impact other homeowners in Mount Olympus. The trial court found the Rosses' "primary focus in defending against this action was to avoid having to reduce the height of their own trees, and not to protect trees on other properties." Nor did the Rosses join the MOPOA or prevail on their own cause of action for declaratory relief, actions that might have indicated pursuit of a broader public right beyond the Rosses' personal interests.

The Rosses argue that the trial court abused its discretion because its attorney fees ruling contradicts its ruling on the merits, which included findings that uniform or general

enforcement of the CC&Rs restriction on tree height could leave a barren landscape, adversely impact the beauty of the area, and decrease property values. This argument ignores the balance of the trial court's statement of decision on the merits, which makes clear that its ruling was narrowly tailored to the issue presented by Shah, namely whether the specific trees on the Rosses' property obstructed Shah's view in violation of the CC&Rs. The trial court ruled that Rosses' eight trees blocked at most 5 percent of Shah's view, an insufficient amount to be considered obstructing Shah's view in violation of a reasonable interpretation of the CC&Rs. These findings make clear that the parties' private economic interests, not a public right, were at the core of the dispute, the litigation, and the court's ruling. The trial court did not abuse its discretion in denying fees under section 1021.5.

DISPOSITION

The order denying Michael Ross and Phyllis Ross' attorney fees is affirmed. In the interests of justice, each party is to pay its own costs on appeal.

MOOR, J.

I CONCUR:

BAKER, J.

RUBIN, P.J. – Dissenting

The trial court's statement of decision and order on the motion for attorney fees, numbering a total of 39 pages, is well-reasoned, well-researched and comprehensive. However, there is one element of this case that, in my view, is missing from the trial court's ruling on the attorney fees motion: The court did not address the fundamental ambiguity in the Declaration of Restrictions (CC&Rs) that deals with homeowner enforcement actions. As such, the trial court did not consider the effect of that ambiguity on the award of attorney fees. The majority finds no ambiguity in the CC&Rs, thus implicitly agreeing with the trial court on this point and also on the trial court's analysis of the inapplicability of Civil Code section 1717 (section 1717). Therefore, I respectively dissent.

The one aspect of this case that should be beyond debate is that the CC&Rs are ambiguous in terms of their impact on the present litigation. The proof of this ambiguity starts with the allegations in Shah's Second Amended Complaint. When Shah sued the Rosses for violation of the CC&Rs, he expressly relied on section 12.01 of that document, which provides: "The provisions contained in this Declaration shall bind and inure to the benefit of and be enforceable by Declarant *and the owners of any portion of said property* . . . ." (Italics added.) That was the mechanism by which Shah believed he could enforce the tree-height provisions in section 5.03. He also applied this stand-in-the-shoes provision to the first sentence in section 12.04, which provides that every act or omission that results in a violation of

the CC&Rs "is hereby declared to be and constitute[s] a nuisance, and every remedy allowed by law or equity against a nuisance, either public or private, shall be applicable against every such result, and may be exercised by Declarant." Neither section 5.03 nor 12.04 refers to home owners or private enforcement actions. Only "Declarant" is mentioned. Having asserted throughout this litigation that Declarant includes homeowners for some purposes, Shah can hardly complain that there is no ambiguity when he now argues "Declarant" excludes homeowners for other purposes. Thus, the central issue of this appeal – how to resolve the ambiguity.

Illuminated by this background of Shah's apparent gamesmanship, I would conclude that the language of sections 12.01 and 12.04 of the CC&Rs creates an ambiguity, and must reasonably be construed in favor of a homeowner's right to recover attorney fees. Further, I believe that, regardless of ambiguity, section 1717 mandates that the fee provision applies to the entirety of the CC&Rs, also requiring an award of attorney fees in this case. I would reverse and remand for a calculation of a proper fee award.

1. *The Key Provisions and The Parties' Reliance On Them*

I start my analysis by reciting in full the contractual provisions at the heart of this case, all of which were referenced in Shah's Second Amended Complaint.

Section 5.03 states "No obstructions or trees having a height greater than ten (10) feet above the finished graded surface of the ground upon which it is located which would deprive any owner within a five hundred (500) foot radius of such obstruction or trees of a view shall be erected or maintained without the written approval of Declarant."

Section 12.01 states, "The provisions contained in this Declaration shall bind and inure to the benefit of and be enforceable by Declarant and the owners of any portion of said property, or their respective legal representatives, heirs, successors and assigns."

Section 12.04 states, "The result of every act or omissions whereby any condition or restriction herein contained is violated, in whole or in part, is hereby declared to be and constitute a nuisance, and every remedy allowed by law or equity against a nuisance, either public or private, shall be applicable against every such result, and may be exercised by Declarant. In any legal or equitable proceeding by Declarant for the enforcement, or to restrain a violation of, this Declaration or any provisions hereof, the losing party or parties shall pay the attorney fees of the winning party or parties in such amount as may be fixed by the court in such proceedings."

In his complaint, Shah relied on section 12.01 to allow him (and not the homeowners association) to enforce section 5.03 and to pursue the nuisance remedies expressly granted only to the Declarant in the first sentence of section 12.04. In contrast, Ross then relied on section 12.01 to support his claim for attorney fees even though read in isolation the attorney fees provision in section 12.04 applies in actions brought by Declarant. The trial court disagreed with Ross and refused to award attorney fees.

2. *The Shpirt Case Is Not Controlling*

In support of its conclusion that "The Attorney Fees Clause Does Not Apply to Actions Between Homeowners," (Maj. Opn. at p. 9), the majority relies significantly on a prior opinion of the Court of Appeal, *Mount Olympus Property Owners Assn. v. Shpirt* (1997) 59 Cal.App.4th 885 (*Shpirt*). *Shpirt* is initially enticing.

After all, it is a published opinion considering the very same language in the very same CC&Rs in a case involving one of the very same parties (Ross). On closer review, the opinion reveals an undeveloped, conclusory analysis which does not address either ambiguity or section 1717 – the two issues which I believe dictate the disposition of this appeal.

In *Shpirt*, Ross and the Mount Olympus Property Owners Association (MOPOA) together brought suit against the Shpirts – neighbors to Ross who sought to enlarge their house without MOPOA's approval, in violation of the CC&Rs. Having been granted tentative approval for a modification, the Shpirts demolished a portion of their home and allowed the property to fall into a state of disrepair. (*Shpirt, supra*, 59 Cal.App.4th at pp. 887-888.) MOPOA originally agreed to assign its right to recover attorney fees in the action to Ross, but when MOPOA settled with the Shpirts mid-litigation, MOPOA agreed to waive its right to seek attorney fees. (*Id.* at pp. 889-890.)

The trial court ultimately found in favor of Ross, concluding that the Shpirts had breached the CC&Rs and created a nuisance. (*Shpirt, supra,* 59 Cal.App.4th at p. 891.) Ross was awarded damages, injunctive relief, and attorney fees. (*Id.* at p. 892.)

Ross had sought fees on multiple bases, including under section 12.04 of the CC&Rs and an attorney fee statute which was part of the Davis-Stirling Common Interest Development Act. (*Shpirt, supra,* 59 Cal.App.4th at p. 893.) The trial court had allowed fees under the statute, but denied them under section 12.04, stating, " 'The CC&R's, however, clearly exclude the award of attorneys fees in actions brought by individual homeowners, in contrast to actions brought by the Association.

Although Section 12.01 provides that the CC&R's are enforceable by either the "Declarant" (MOPOA) and the owners, Section 12.04 provides for attorneys fees only to the Declarant. [Civil Code] section 1717 and the cases cited by plaintiff involve reciprocity; here, neither a plaintiff nor a defendant homeowner could recover fees under the CC&R's in an action between homeowners.' " (*Ibid.*)

On appeal, the Shpirts challenged the award of fees under the Davis-Stirling Common Interest Development Act, and Division Four of this district agreed, concluding that *Mount Olympus* did not meet the statutory definition of a common interest development. (*Shpirt, supra,* 59 Cal.App.4th at pp. 894-896.)

Ross then "contend[ed] that any error in awarding attorney fees to Ross under [the statute] [was] harmless because the identical fees could have been awarded under the CC&R's." (*Shpirt, supra,* 59 Cal.App.4th at p. 896.) The entirety of the appellate court's analysis of the point consists of the following three sentences: "We see no reason to disturb the trial court's ruling in this regard. As the court noted, paragraph 12.01 of the CC&R's permits both MOPOA and individual homeowners to enforce its provisions, but paragraph 12.04 specifies that fees are awardable only to 'Declarant' (MOPOA). The CC&R's do not assist Ross in his quest for attorney fees." (*Ibid.*)

Preliminarily, this brief discussion, which cites no authority beyond the reference to the CC&Rs, actually misstates the contractual language. Section 12.04 does not specify that fees "are awardable *only* to 'Declarant.' " (Italics added.) Instead, it specifies that fees are awardable to the prevailing party "[i]n any legal or equitable proceeding by Declarant." The distinction is

significant. Indeed, the *Shpirt* action had, in fact, been brought by Ross *and the MOPOA*. More importantly, though, is the fact that the appellate court did not address (1) whether Ross stood in the shoes of the Declarant for the purposes of section 12.04; (2) whether sections 12.01 and 12.04 read together created an ambiguity in the contract; or (3) whether section 1717 had an effect on the interpretation of the attorney fee clause. We know that "an opinion is not authority for a proposition that it did not consider. [Citation.]" (*Herterich v. Peltner* (2018) 20 Cal.App.5th 1132, 1147.) I conclude that we are therefore writing on a clean slate, and now proceed to the analysis which the *Shpirt* opinion did not conduct.

3. *CC&Rs Are Interpreted As Contracts*

I begin with some general observations about CC&Rs and contracts. "Planned communities have developed to regulate the relationship between neighbors so all may enjoy the reasonable use of their property. Mutual restrictions on the use of property that are binding upon, and enforceable by, all units in a development are becoming ever more common and desirable." (*Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 349.) While such restrictions may be documented in equitable servitudes or covenants running with the land (depending on legal requirements), they are binding because purchasers of the property "are deemed to intend and agree to be bound by, and to accept the benefits of, the common plan," when they purchase property with constructive notice of the recorded restrictions. (*Ibid.*)

Thus, even though CC&Rs are not created in the traditional manner of contract offer and acceptance, the law considers them as contracts. "The same rules that apply to

interpretation of contracts apply to the interpretation of CC&R's." (*Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1377.) Contract interpretation in the absence of extrinsic evidence is a task courts perform de novo. (*R.W.L. Enterprises v. Oldcastle, Inc.* (2017) 17 Cal.App.5th 1019, 1025.)

Courts also interpret attorney fee clauses pursuant to the traditional rules of contract interpretation. (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 752.) "Accordingly, we first consider the mutual intention of the parties at the time the contract providing for attorney fees was formed. [Citation.] Our initial inquiry is confined to the writing alone. [Citations.] ' "The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' [citation], controls judicial interpretation. [Citation.] Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." [Citations.]' [Citations.] At the same time, we also recognize the 'interpretational principle that a contract must be understood with reference to the circumstances under which it was made and the matter to which it relates. [Citation.]' [Citation.]" (*Ibid.*)

Different rules apply if we were to conclude the contractual terms are ambiguous. "A contract provision is considered ambiguous when it may be interpreted in two or more ways, both of which are reasonable. [Citation.]" (*511 S. Park View, Inc. v. Tsantis* (2015) 240 Cal.App.4th Supp. 44, 48.) When a contract term is ambiguous, "it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee

understood it." (Civ. Code, § 1649.) If that rule does not resolve the uncertainty, the language " 'should be interpreted most strongly against the party who caused the uncertainty to exist.' (Civ. Code, § 1654.)" (*Linton v. County of Contra Costa* (2019) 31 Cal.App.5th 628, 636.)

4. *The Attorney Fee Clause Is Ambiguous*

Here, the attorney fee clause is the second sentence of paragraph 12.04 of the CC&Rs. It provides, "In any legal or equitable proceeding by Declarant for the enforcement, or to restrain a violation of, this Declaration or any provisions hereof, the losing party or parties shall pay the attorneys' fees of the winning party or parties in such amount as may be fixed by the court in such proceeding." Related is paragraph 12.01 of the CC&Rs, which provides, "The provisions contained in this Declaration shall bind and inure to the benefit of and be enforceable by Declarant and the owners of any portion of said property, or their respective legal representatives, heirs, successors and assigns."

The Rosses would have us read these two clauses together. They posit that, since the attorney fee clause in section 12.04 is a "provision" of the CC&Rs, and section 12.01 makes such "provisions" enforceable not only by the "Declarant," but by individual property owners as well, it follows that attorney fees may be recovered in actions brought by individual property owners. (See Civ. Code, § 1641 ["The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."].) This interpretation is reasonable on its face.

Closer review of the contract suggests a flaw. There are several provisions of the CC&Rs which grant rights to the

Declarant which, if those rights are extended to individual homeowners, would be wholly unreasonable. For example, section 12.03 provides that violation of the CC&Rs "shall give to Declarant, its officers, agents or representatives, the right to enter upon the property or as to which such violation exists, and to summarily abate and remove, at the expense of the owner thereof, any erection, thing or condition that may be or exist thereon contrary to the intent and meaning of the provisions hereof; and they shall not thereby be guilty of any manner of trespass for such entry, abatement or removal." At oral argument, the Rosses conceded that this particular enforcement provision, limited by text to "Declarant," should not, in fact, be extended to the homeowners by section 12.01. The picture of multiple homeowners traipsing upon their neighbors' properties to remedy CC&R violations is not a pretty sight, and I agree that this could not have been the intended meaning of the CC&Rs.

One other example helps prove the point. Section 7.01 grants the Declarant a right to approve in advance buildings and other structures added to the properties. Clearly, if each homeowner had the right to approve his or her own additions (or disapprove those of his neighbors) this provision would be meaningless and would create a chaotic living environment. Thus, I am left to conclude that section 12.01 could not possibly mean what it says: not *all* provisions of the CC&Rs are enforceable by individual homeowners.

On the other hand, it does not follow that *no* CC&R is enforceable by a homeowner, for that would negate section 12.01. Shah does not offer a helpful interpretation as to the proper scope of section 12.01. In Shah's respondent's brief, he suggests that the plain language of section 12.04 limits attorney fees to actions

brought by the Declarant, and that the language of section 12.01 does not change that. He believes that section 12.01 "gives homeowners in Mount Olympus the right to enforce restrictions contained in the Declaration of Restrictions," but not the right to recover attorney fees set forth in section 12.04. He argues that to read the two clauses together would render section 12.04's language "meaningless."

There are two gaps in Shah's argument. First, it is not supported by the language of section 12.01. Shah would limit a homeowner's enforcement rights in section 12.01 to the "restrictions" in the CC&Rs, but 12.01 makes no mention of "restrictions." Instead, it gives homeowners the right to enforce "provisions" of the CC&Rs. Shah offers no explanation for how the tree-height restriction of section 5.03 is a "provision" within the meaning of section 12.01 (and therefore enforceable by an individual homeowner, as in the present lawsuit) but the attorney fee language of section 12.04 is not a "provision."

Second, Shah's interpretation is inconsistent with Shah's own actions in this case. In bringing this lawsuit, Shah relied on the terms of the CC&Rs which he believed permitted him to do so. He did not simply bring a tort cause of action for nuisance; he sued for breach of the CC&Rs and a declaration that the Rosses were in violation of those documents. Even Shah's nuisance causes of action relied on the CC&Rs; they each contained an allegation that that CC&Rs "expressly provide that the above actions of Defendants constitute a nuisance." In doing so, Shah acted pursuant to the very provision he now wishes to construe as providing enforcement rights only to the Declarant. Shah alleged that section 12.04 "provides that every act or omission of the [CC&Rs] constitutes a nuisance, and every remedy allowed by

law or equity against a nuisance, either public or private, shall be applicable." Tellingly, Shah did not quote the remainder of that sentence, which provides that "every remedy allowed by law or equity against a nuisance, either public or private, shall be applicable against every such result, *and may be exercised by Declarant*." (Emphasis added.) In short, in bringing his nuisance causes of action, Shah was exercising a remedy which paragraph 12.04 of the CC&Rs grants exclusively to the Declarant. Shah apparently believed that the provisions of paragraph 12.01 allowed him to stand in the shoes of the Declarant under section 12.04. Shah could not have pursued his complaint at all if, as he now argues, section 12.01 only extends to homeowners the right to enforce "restrictions," and not the actual enforcement mechanism provisions of section 12.04.[1]

I am left with the conclusion that neither party's interpretation of section 12.01 renders the entirety of the contract language reasonable and meaningful. I would therefore conclude section 12.01 is ambiguous.

5. *The Rules of Interpreting Ambiguous Contracts Support Homeowners' Right to Seek Attorney Fees*

Concluding that there is an ambiguity in the contract caused by section 12.04's limitation of attorney fees to suits brought by the Declarant and section 12.01's extension of enforcement rights to individual homeowners, I turn to the rules

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[1] The majority would apparently solve this problem by not reading section 12.01 to expand *any* portion of section 12.04 from "Declarant" to homeowners. But this raises a new problem: If, as the majority rightly holds, no provision of the contract is to be rendered mere surplusage, which "provisions" of the CC&Rs, not otherwise enforceable by the homeowners, are, in fact, rendered so enforceable by section 12.01?

for interpreting ambiguous contracts in the absence of extrinsic evidence.

The first rule states we must interpret the language in the sense in which the promisor believed, at the time of making it, that the promisee understood it. Although Shah (as promisee) has taken the position in his nuisance cause of action that "Declarant" includes homeowners in section 12.04, this concession assists our task marginally. There is no suggestion by either party as to what the Declarant understood a reasonable potential homeowner to believe as to the attorney fee provision, either at the time the Declarant drafted the provision or at the time the homeowners purchased property and agreed to the CC&Rs. I do note, however, that there is certainly nothing uncommon or unreasonable in extending the right to recover attorney fees to homeowners. Under the Davis-Stirling Common Interest Development Act, the prevailing party in an "action to enforce the governing documents" is statutorily entitled to recover attorney fees. (Civ. Code, § 5975, subd. (c).) This provision has supported an award of attorney fees in a suit between homeowners. (See *Chee v. Amanda Goldt Property Management, supra,* 143 Cal.App.4th at p. 1354.) While the Act does not apply in this case, because *Mount Olympus* lacks a common area (Civ. Code, § 4201; *Shpirt, supra,* 59 Cal.App.4th at pp. 895-896), it is apparent that an interpretation which allows homeowners to recover attorney fees in CC&R enforcement actions against other homeowners is both reasonable and consistent with the public policy supporting this provision of the Act.

The second interpretive rule is that the language should be construed most strongly against the party who caused the

uncertainty to exist. That party is the drafter, the Declarant. Interpreting the attorney fee clause most strongly against the Declarant and in favor of the other "contracting parties" – the homeowners – results in an interpretation that attorney fees may be recovered not only in suits brought by the Declarant, but also in suits brought by any homeowner.

The interpretation rules aside, construing section 12.04 to include claims by homeowners is sensible. As I have observed, not every enforcement right the Declarant possesses under the CC&Rs is enforceable by homeowners, notwithstanding the apparent express grant of enforcement rights in section 12.01. But in those situations in which section 12.01 does grant co-extensive rights with the Declarant, such as in Shah's nuisance and section 5.03 claims, there is nothing in section 12.01 that suggests attorney fees should be denied to a homeowner who is acting in place of the Declarant.[2]

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[2] In this regard, it is helpful to consider the text of section 12.04 in its entirety: "The result of every act or omissions whereby any condition or restriction herein contained is violated, in whole or in part, is hereby declared to be and constitute a nuisance, and every remedy allowed by law or equity against a nuisance, either public or private, shall be applicable against every such result, and may be exercised by Declarant. In any legal or equitable proceeding by Declarant for the enforcement, or to restrain a violation of, this Declaration or any provisions hereof, the losing party or parties shall pay the attorneys' fees of the winning party or parties in such amount as may be fixed by the court in such proceedings. Such remedies shall be deemed cumulative and not exclusive." In other words, attorney fees are granted the prevailing party in enforcement actions brought by the Declarant. When we are concerned with an enforcement action brought by a homeowner exercising the Declarant's right

6. *The Rosses Are Entitled to Prevailing Party Attorney Fees Under Section 1717*

This conclusion is confirmed by section 1717. Indeed, even if section 12.01 (extending enforcement rights to homeowners) were stricken from the CC&Rs entirely and the contract contained only section 12.04's right to attorney fees in actions brought by the Declarant, the law would extend that attorney fee provision to this case.

Section 1717, subdivision (a), provides, in pertinent part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. [¶] *Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract,* unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract." (Italics added.)

"[P]rovision for attorney fees in a declaration of restrictions constituting a binding equitable servitude is a 'contract' within the meaning of Civil Code section 1717." (*Mackinder v. OSCA Development Co.* (1984) 151 Cal.App.3d 728, 738.) "Regardless of the form of the instrument, whether by contract, deed, or binding equitable servitude, an instrument containing a provision for the recovery of attorney fees in the event of litigation is governed by

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to bring such an action, there is no reason the attorney fee provision would not also be triggered.

the reciprocity provisions of Civil Code section 1717." (*Id.* at p. 739.)

My analysis focuses on the second paragraph of section 1717, providing that where "a contract provides for attorney's fees . . . that provision shall be construed as applying to the entire contract . . . ."[3] This provision was added by legislative amendment in 1983. Prior to that time, section 1717 had only the first clause, rendering attorney fee provisions which expressly benefitted only one party applicable to the prevailing party. In 1980, *Sciarrotta v. Teaford Custom Remodeling, Inc.* (1980) 110 Cal.App.3d 444 (*Sciarrotta*) considered a construction contract which provided for an award of attorney fees to the contractor should it be forced to sue to recover the contract price. The litigation in question, however, did not involve payment of the contract price, but rather was brought by the homeowners for the contractor's failure to construct the house in a workmanlike manner. The plaintiff homeowners were successful at trial, and sought their attorney fees as prevailing parties under section 1717. They were denied fees, and the Court of Appeal affirmed, holding, over a dissent, that section 1717 "limits reciprocity to those specific provisions of the contract in which attorney's fees are provided." (*Id.* at p. 446.)

"The Legislature amended [section 1717] in 1983 to add the following paragraph to subdivision (a): 'Where a contract

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[3] This provision does not apply if "each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract." (§ 1717, subd. (a).) There is no suggestion that this exception would apply in this case; the CC&Rs do not even state that the Declarant was represented by counsel.

provides for attorney's fees, . . . that provision shall be construed as applying to the *entire contract* . . . .' (Italics added)." (*Harbor View Hills Comty. Ass'n v. Torley* (1992) 5 Cal.App.4th 343, 346.) This amendment had the express purpose of overturning the opinion in *Sciarrotta*. (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1147.) The goal of the bill was to " 'put both parties to a contract on equal footing.' " (*Ibid.*) Following the 1983 amendment, limited attorney fee clauses were held to apply to the entire contract in different types of cases, including leases (*Hjelm v. Prometheus Real Estate Group, Inc.* (2016) 3 Cal.App.5th 1155, 1175) and commercial disputes (*Boyd v. Oscar Fisher Co.* (1989) 210 Cal.App.3d 368, 379-380 [invoices with attorney fee provision are read as part of the dealership agreement; the limited attorney fee clause applies to the parties' entire agreement].)

Relevant for our purposes, the second clause of section 1717 has specifically been applied to broaden a narrow attorney fee clause in CC&Rs. In *Harbor View Hills Comty. Ass'n v. Torley*, *supra*, 5 Cal.App.4th 343, the CC&Rs contained an attorney fees provision which "only concerned nonpayment of assessments." (*Id.* at p. 345.) Applying the second clause of section 1717, the Court of Appeal extended the right to recover attorney fees to a suit regarding unapproved alterations, which was not within the scope of the limited attorney fees provision in the CC&Rs. (*Id.* at p. 346.) The court also held the statutory provision applies retroactively to CC&Rs which predated its enactment. (*Id.* at p. 349.)

Section 12.04 of the CC&Rs, awarding attorney fees to the prevailing party in any action "by Declarant for the enforcement, or to restrain a violation of, this Declaration or any provisions

hereof" is similar to the provision in *Sciarrotta* which provided for fees only in the event the contractor sued the homeowners for failure to pay the contract price. (*Sciarrotta, supra,* 110 Cal.App.3d at p. 446.) The Legislature amended section 1717 to supersede the *Sciarrotta* court's ruling that such a clause would be enforced according to its terms. Under that amended section 1717, the *Sciarrotta* homeowners would have been able to recover their fees in their action for shoddy workmanship despite the limited language of the attorney fees clause. Similarly, here, section 12.04 is properly interpreted under section 1717 to provide for attorney fees to the prevailing party in any suit on the CC&Rs.[4]

In sum, section 1717 applies to any action on a contract where the contract "specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party . . . ." Here, section 12.04 provides for attorney fees to the

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[4] I disagree with the majority's suggestion, unsupported by citation to authority, that the provisions of section 1717 may be disregarded when failing to apply them would not result in a one-sided or oppressive result. More importantly, though, I believe that the attorney fee provision in section 12.04 is precisely the sort of narrow provision the 1983 amendment of section 1717 was intended to address. The Declarant drafted an attorney fee provision which, although superficially reciprocal, applied only in actions the Declarant chose to pursue, thus leaving it entirely to the Declarant to determine whether any action on the CC&Rs would be one in which attorney fees would be recoverable. This is, by its very nature, one-sided. The attorney fee provision should apply in *any* action brought to enforce the CC&Rs, regardless of whether the Declarant or some other legally interested party chose to file it.

prevailing party "in any legal or equitable proceeding by Declarant for the enforcement, or to restrain a violation of, this Declaration or any provisions hereof . . . ." That is clearly an attorney fee provision subject to section 1717. Section 1717 affects this attorney fee provision in two respects. The first paragraph of section 1717 confirms that attorney fees will be awarded to the prevailing party "whether he or she is the party specified in the contract or not." The second paragraph of section 1717 provides that the attorney fee clause "shall be construed as applying to the entire contract." In other words, section 1717 renders the restrictive attorney fee clause as one providing for prevailing party attorney fees for any action to enforce the CC&Rs. Shah brought an action to enforce section 5.03 of the CC&Rs and the Rosses prevailed; the Rosses should be entitled to their attorney fees.

RUBIN, P. J.